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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. CRAIG WILLIAM WESNER, Defendant and Appellant.	C039699 (Super. Ct. No. CM013550)

A jury convicted defendant Craig William Wesner of inflicting injury on a child that resulted in a traumatic condition. (Pen. Code, § 273d, subd. (a).) Defendant was sentenced to the upper term of six years in state prison.

On appeal, defendant contends the trial court erred by admitting evidence of an uncharged sexual offense pursuant to Evidence Code section 1108. Defendant also argues that giving the instruction urging jurors to report misconduct, CALJIC No. 17.41.1, deprived him of a fair trial. We find no error and shall affirm.

FACTUAL AND PROCEDURAL HISTORY

Defendant was originally charged with two counts of anal penetration of 22-month-old N.G. (Pen. Code, § 289, subd. (a)(1).) After an amended information was filed substituting the charge of inflicting corporal injury on a child (Pen. Code, § 273d, subd. (a)), defendant went to trial in January 2001. No evidence of any other sexual offense was presented.[1] The jury deadlocked, and a mistrial was declared.

Defendant's second trial began on June 11, 2001. At this trial, the prosecution presented evidence of an uncharged sexual offense, and defendant testified in his own behalf. Defendant was convicted.

The Crime

Viewed in the light most favorable to the judgment (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329), the following facts were adduced at the second trial:

On January 29, 2000, 22-month-old N. lived in an apartment with his mother, B.G. Ms. G. had been dating defendant since November 1999. Defendant baby-sat N. six or seven times.

Defendant came to Ms. G.'s apartment on January 29 to spend the night and to baby-sit N. while Ms. G. went to work the next day. Ms. G. gave N. a bath and prepared him for bed. She did not see any injuries to N.'s body. Ms. G. arose about 4:30 a.m.

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[1] The reporter's transcript of the earlier trial is not part of the record. However, the minute orders in the record do show the list of witnesses at the first trial.

and prepared to go to her 6:00 a.m. to 2:30 p.m. shift as a certified nursing assistant in a convalescent hospital. Ms. G. changed N.'s diaper and dressed him; N. was uninjured. Defendant drove Ms. G. to work and took care of N.

About 10:30 a.m., defendant drove N. to meet Ms. G. for lunch. Ms. G. noticed bruising about N.'s eyes.

Ms. G. arrived home about 2:45 p.m. After defendant left, two friends of Ms. G. came to her apartment. When Ms. G. changed N.'s diaper about 6:30 p.m., she noticed a large amount of diaper rash ointment on his genital area. She then saw torn skin and bruising on his penis; bruising on his scrotum and around his anus; and additional bruising on his face, neck, and back. She took N. to the emergency room.

Oroville Hospital physician's assistant John Stack examined N. He determined N. was suffering from bruising and scratch marks on his penis, head, and scrotum. N.'s anus was dilated, suggesting trauma. Dr. Glick, medical supervisor of the emergency room, examined N. the next day and reported extensive bruising on N.'s forehead, arms, and legs as well as a bruised and dilated anus.[2]

Sally Vertolli, a family nurse practitioner, examined N. on February 2, 2000. She took photographs of N.'s injuries with a colposcope. Dr. Lisa Benaron, Vertolli's supervisor and a

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[2] Dr. Glick died before trial. His report was provided to other medical personnel. At this trial, Stack testified about the contents of Dr. Glick's report.

pediatrician with experience examining more than 200 suspected child abuse victims, explained the mechanism of bruising. Dr. Vertolli explained that bruising is apparent in a child's penis immediately after an injury because the skin is pale.

Other Sexual Assault Evidence

M.T. testified that she dated defendant for six months in 1999. She let defendant baby-sit her six-year-old son S.T. and her 10-year-old daughter while she was at work. After she learned defendant had been arrested for the charges involving N., she discussed defendant with her children. Both children denied defendant had done anything to them. However, after S. was suspended from school for putting his hands down a little girl's pants, S. told Ms. T.'s boyfriend that defendant had put his hands down S.'s pants.

S., eight years old at the time of defendant's second trial, testified that when he was six years old, defendant reached into S.'s pants and touched his buttocks and squeezed his penis. A sexual assault investigator's videotaped interview with six-year-old S. was shown to the jury by the defense.

Defense Case

Defendant testified in his own behalf. Defendant testified that Ms. G. told him she was uncomfortable leaving N. in the care of her sister or her roommates. Defendant explained that he took Ms. G. to work on the morning of January 30 and banged N.'s head pulling him out of the car seat. He gave N. a bath. He noticed bright red areas under N.'s diaper, which he assumed were diaper rash. N. also fell on the floor while defendant was

making breakfast. He told Ms. G. that N.'s penis looked "terrible," and she told him to put Desitin on the baby's bottom for diaper rash.

Defendant denied ever improperly touching S.

DISCUSSION

I

Defendant contends the trial court abused its discretion under Evidence Code section 1108 by admitting evidence that he had molested S.[3] He argues the trial court erred by not excluding the evidence as more prejudicial than probative under section 352 and maintains admission of this evidence violated his constitutional rights. We hold the trial court did not abuse its discretion in admitting the evidence.

A. Background

Before the first trial in this case, the trial court apparently denied the prosecution's motion to join the present case involving N. with the then-pending case in which S. was the victim. Although a minute order from the first trial states that the People's motion to introduce evidence under Evidence Code section 1108 was granted, evidence of the S.T. incident apparently was *not* presented to the first jury, which deadlocked. After a mistrial was declared, defendant pleaded no contest to misdemeanor child annoyance in the case involving S. (Pen. Code, § 647.6.) As a condition of that negotiated plea,

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[3] All further statutory references are to the Evidence Code unless otherwise indicated.

the prosecution agreed that defendant's plea could not be introduced against him during this trial.

However, admission of the facts of the S.T. case as an uncharged sexual offense was up to the trial court. Before the second trial, the parties again filed written motions concerning the admission of the S.T. incident as sexual propensity evidence. At the hearing on the motion in limine, in addition to objecting to the admission of propensity evidence under the due process clause, defense counsel argued that the evidence concerning S. was not reliable or probative because the incidents were so dissimilar and the evidence was weak. Defense counsel argued it was far from certain that defendant had committed any assault, because S. originally had denied that defendant ever improperly touched him. S. only volunteered the information to avoid punishment. Defense counsel contended the evidence was inflammatory and would confuse the jury.

The prosecution argued there were similarities between the offenses. Both victims were male, and both incidents occurred while defendant was baby-sitting children of women he was dating. The prosecution further argued that the S.T. evidence was much less severe than the current charge and that the probative value outweighed any prejudicial effect.

The trial court relied on a checklist found in *People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 (*Falsetta*) for determining the admissibility of other sex crimes evidence. The trial court further found that the undue prejudice to defendant could be determined by factors described in this court's opinion

in *People v. Harris* (1998) 60 Cal.App.4th 727, 736-737 (*Harris*). Applying these factors, the trial court determined the evidence was admissible.[4]

The trial court noted that because there had been criticism of the rule permitting a jury to determine the existence of uncharged acts by finding the acts true under a preponderance of the evidence standard, it would only instruct on "reasonable doubt" as the standard of proof in the instructions. Both parties agreed to the modification. The jury was given two cautionary instructions concerning the other crimes evidence. First, before the testimony of S. and his mother, the court stated:

"Evidence will be introduced at the first part of the people's case for the purpose of showing that Mr. Wesner engaged in a sexual offense other than that which is charged in the case. If you find that he committed the prior sexual offense, you may, but are not required to infer that he had a disposition to commit same or similar type sexual offenses. [¶] If you find the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. You are not to consider that evidence for any other purpose than that potential issue unless

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[4] The trial court ruled that the evidence would be admissible as an uncharged crime under the narrower ground of character evidence of section 1101, subdivision (b). Because we conclude the evidence was admissible under section 1108, we need not determine whether the evidence was admissible under section 1101, subdivision (b).

you are otherwise instructed. [¶] So I wanted to give you that instruction before the evidence came in so you would have the purpose. He is not charged with a crime involving [S.]. If you find that he did what is alleged to [S.], that doesn't mean he's guilty of the crime involving N. You may consider it as evidence of a disposition, if you wish. It will be up to what you find the facts to be."

Second, as part of the general instructions, the trial court stated:

"Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than the charge in the case. 'Sexual offense' means a crime under the laws of the state, or of the United States that involves any of the following: [¶] Contact without consent between any part of the defendant's body, or a foreign object, or the genitals or anus of another person. If you find that the defendant committed a prior sexual offense, you may, but are not required to infer that the defendant had a disposition to commit the same or similar type sexual offenses. [¶] If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. However, if you find that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. [¶] The weight and significant [*sic*] of the evidence, if any, are for you to decide. You must not consider this evidence for any other purpose."

B. Analysis

We evaluate any decision to admit evidence of other crimes under the deferential abuse of discretion standard. That is to say, we affirm the decision of the trial court unless "'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 (*Rodrigues*).) We conclude the trial court properly exercised its discretion in finding the evidence more probative than prejudicial.

1. Probative Value

Evidence of other sexual offenses, uncharged in the pending proceeding, is admissible under section 1108 to support an inference that a defendant has committed the charged crime:

"In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a).) The currently charged crime need not be a particular statutory sexual offense. Rather, the current charge may be:

"Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person." (§ 1108, subd. (d)(1)(B).)

In *Falsetta*, *supra*, 21 Cal.4th 903, our Supreme Court listed a number of factors to be considered by the trial court in evaluating section 1108 evidence, by balancing the probative

value of the uncharged act against the prejudicial effect, including such factors as its "nature, relevance, and possible remoteness, [and] the degree of certainty of its commission . . . ." (*Falsetta*, *supra*, 21 Cal.4th at p. 917.)

Several factors are inapplicable to this case. The S.T. incident was not remote in time, having occurred some months before. The fondling incident was relatively simple, and there were no other incidents proffered before trial. Rather, defendant focuses, as he did in the trial court, on the dissimilarity of the incidents, the burden on defendant to defend against S.'s allegation, the likelihood of misleading the jury, and the prejudicial impact on the jurors.

While recognizing certain dissimilarities, we hold that the S.T. incident had sufficient similarity to make it relevant and probative. The sexual nature of the assaults on very young boys whom defendant was baby-sitting demonstrates relevance and a predisposition for sexual attacks on male children. Moreover, defendant's access to the children was through dating the mothers.

Next, what defendant characterizes as the "imprecision" of S.'s testimony due to differences in details between the videotaped interview and his trial testimony was, at trial, fully developed for the jury to consider. The jury was clearly instructed that it was neither required to accept nor reject the testimony in determining defendant's guilt. It was free to make an inference or not to do so.

Further, the "burden" on defendant to defend against the allegation was relatively small. Unlike the situation in *Harris*, *supra*, 60 Cal.App.4th at pages 736-741 in which evidence of a remote act of violent rape of a stranger at his apartment complex was not probative to the accusation that the defendant, a psychiatric technician, accosted two patients under his care, this uncharged offense was relatively minor and much less graphic than the charged crime. This was not a case in which a trial on the other crimes evidence overwhelmed the trial on the charged crime, either in severity or detail. Defendant was well equipped to challenge S.'s credibility through his videotaped inconsistent statements and through cross-examination.

For the same reasons, we conclude there was little risk that the jury was misled or confused. Although there were several medical witnesses along with documentary and photographic evidence, all the medical testimony concerned N. The only witnesses on the S.T. incident were S. and his mother.

The trial court properly found the evidence to be probative.

2. Undue Prejudice

We also conclude the trial court's finding that the evidence was not unduly prejudicial was proper. Section 1108 provides that relevant and probative evidence will still be excluded if it is barred by section 352.[5]

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[5] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability

We defer to the trial court's decision under section 352. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1124.) The S.T. incident does not reach the threshold of unacceptable prejudice under section 352. The facts of the prior conduct are not so egregious or inflammatory that the jury would set aside its responsibility to fairly apply the instructions to the evidence and "prejudge" defendant. (*Harris*, *supra*, 60 Cal.App.4th at p. 737.) We see no abuse of the trial court's discretion in its conclusion that the probative value of the evidence was not substantially outweighed by the danger of undue prejudice.

In *Harris*, we found the other sexual crime evidence "was inflammatory *in the extreme*." (*Harris*, *supra*, 60 Cal.App.4th at p. 738.) Here, there was no physical injury to S. In contrast, the injuries to N. and his tender age establish that he clearly was assaulted by another person. The sexual gesture toward S., if found true, in the face of the dramatic injuries to N., simply served to explain the sexual nature of defendant's assault on N.

Defendant argues that admission of the S.T. evidence was obviously prejudicial because the prosecution was unable to persuade an earlier jury of defendant's guilt without it. That, however, does not mean the evidence was overwhelmingly prejudicial. It may mean it was persuasive evidence of motive. Moreover, as pointed out by the People, defendant did not

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that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

testify at the first trial and did testify at the second trial. It is reasonable to assume that a jury confronted with defendant's unpersuasive testimony could find reasonable doubt erased.

3. Due Process

Defendant also contends the admission of propensity evidence violates due process. Defendant recognizes that under *Falsetta* and its progeny, this issue is settled under California law. We need not reiterate his due process challenges to section 1108 as they have been soundly rejected. (*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918; *People v. Fitch* (1997) 55 Cal.App.4th 172; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)[6]

Moreover, this jury was not given the panoply of instructions challenged in *Falsetta* and *Fitch* that permitted a jury to infer guilt from a defendant's propensity for sexual assaults based upon a finding the uncharged crime was established by a preponderance of the evidence. Instead, the trial court, with defendant's agreement, substituted reasonable doubt instructions that imposed a stricter standard than the CALJIC pattern instructions approved in *Falsetta* and *Fitch*. The court's action precludes any argument that the admission of

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[6] It is troubling that defendant refers to CALJIC No. 2.50.02 as an instruction that specifically led the jury into constitutional infirmity. He argues that section 352 is not a safeguard in the face of this instruction. However, CALJIC No. 2.50.02 was not given in this case.

other crimes evidence improperly reduced the prosecution's burden of proof and interfered with defendant's due process rights. Therefore, his argument also fails on the merits.

II

Defendant contends the trial court erred by instructing the jury with CALJIC No. 17.41.1; this error, he argues, is structural and requires reversal per se. In the alternative, defendant argues that even if the error is not reversible per se, because this was a "close" evidentiary case the error cannot be found to be harmless beyond a reasonable doubt. In *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*), our Supreme Court rejected constitutional challenges to CALJIC No. 17.41.1. The decisions of the California Supreme Court are binding on us. (*Auto Equity Sales*, *supra*, 57 Cal.2d at p. 455.) This is true even if our Supreme Court's decision rests on an issue of federal law. (See *Midcal Aluminum, Inc. v. Rice* (1979) 90 Cal.App.3d 979, 984, fn. 4, affd. *sub nom. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97 [63 L.Ed.2d 233].) Thus, we are bound by *Engelman* to reject defendant's federal constitutional challenges to CALJIC No. 17.41.1.

Our Supreme Court did direct that CALJIC No. 17.41.1 not be given in trials conducted *in the future*. However, this case was tried before *Engelman* was decided, so that admonition is inapplicable here.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P.J.

SIMS, J.